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AUGUST B. LANDIS

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA**

In re)	No. 10-13676 AJ7
)	
)	Chapter 7
ANGELO P. ACCORNERO)	
LORI E. ACCORNERO,)	Date: January 14, 2010
)	Time: 9:00 a.m.
)	Place: 99 South E Street
Debtors.)	Santa Rosa, California

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
UNITED STATES TRUSTEE'S MOTION TO DISMISS CASE FOR
ABUSE UNDER 11 U.S.C. § 707(b)(1), (2) & (3)**

August B. Landis, Acting U.S. Trustee for the Northern District of California - Region 17, ("U.S. Trustee") hereby submits this memorandum in support of his motion to dismiss this case as an abuse of the provisions of chapter 7 of Title 11 of the United States Code ("Bankruptcy Code").

I. PRELIMINARY STATEMENT

The Debtors, Angelo P. And Lori E. Accornero, are a married couple with two dependents. Mr. Accornero is a police officer with the City of Petaluma, whose monthly gross income is \$10,350. Mrs. Accornero is a retired police officer, receiving disability retirement benefits in the monthly amount of \$3115. Mrs. Accornero also operates a parties supplies business.

The presumption of abuse arises under Section 707(b)(2) of the Bankruptcy Code primarily because Debtors excluded \$3115 in income derived from Mrs. Accornero's disability insurance benefits. Adding Mrs. Accornero's disability benefits to current monthly income, with no other adjustments to the

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Debtors' means test, results in, at the minimum, disposable income of \$2,193 per month. In a sixty month plan, disposable income of \$2,193 per month would generate total dividends of \$131,591, an amount more than sufficient to pay in full Debtors' unsecured debt of \$102,331. No special circumstances to rebut the presumption have been shown.

The U.S. Trustee further contends that dismissal is also appropriate because the totality of the Debtors' financial circumstances demonstrates abuse under Section 707(b)(3)(B) of the Bankruptcy Code. Even with minor adjustments to Debtors' income and expenses, as reflected in Schedules I and J, Debtors have the ability to repay at least \$1083 per month. In a sixty month plan, this would result in total dividends of \$64,980, which would constitute a 63% distribution to creditors based upon total unsecured debt of \$102,331.

II. POINTS & AUTHORITIES

Prior to the enactment of Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), the Court could dismiss a case under Section 707(b) if it found that a debtor's case was a "substantial abuse" of the provisions of chapter 7. Section 707(b)(1) now provides for dismissal of a case with primarily consumer debt for mere "abuse." A chapter 7 case may be dismissed for abuse under Section 707(b)(1) pursuant to either Section 707(b)(2) or 707(b)(3). The presumption in favor of relief for the debtor found in the previous version of the statute no longer exists. In re Egebjerg, 574 F.3d 1045, 1048 (9th Cir. 2009).

Section 707(b)(2) provides objective standards – the means test – for courts to determine whether abuse exists. If a case is presumed abusive, it will be dismissed without the need for further evidence unless the debtor can show "special circumstances" to rebut the presumption. Alternatively, a case may be dismissed under Section 707(b)(3)(A) if it was filed in bad faith or under Section 707(b)(3)(B) if the totality of the circumstances of the debtor's financial situation demonstrates abuse. 11 U.S.C. § 707(b)(3)(A), (B); See In re Egebjerg, 574 F.3d at 1048; In re Pak, 343 B.R. 239, 241 (Bankr. N.D. Cal. 2006); In re Mitchell, 357 B.R. 142, 150 (Bankr. C.D. Cal. 2006). The "abuse" standard of Section 707(b)(3) expressly applies when the presumption of abuse under the Means Test of Section 707(b)(2) does not arise, so that "passing" the Means Test does not preclude a discretionary finding of abuse by the

1 court based on bad faith or the totality of the circumstances. In re Egebjerg, 574 F.3d at 1048; In re
2 Lamug, 403 B.R. 47, 53 (Bankr. N.D. Cal. 2009).

3 Dismissal under section 707(b) is appropriate only if the debtor has primarily consumer debt,
4 defined as “debt incurred by an individual primarily for a personal, family, or household purpose.” 11
5 U.S.C. § 101(8). The Ninth Circuit has determined that a debtor has primarily consumer debt when
6 more than half of the dollar amount owed is consumer debt. See Zolg v. Kelly (In re Kelly), 841 F.2d
7 908, 913 (9th Cir. 1988).

8 The Debtors have identified in their petition that their debts are primarily consumer debt. Based
9 upon a review of Debtors’ Schedules, the listed debt appears to be for a personal, household, or family
10 purpose.

11 **A. Including Mrs. Accornero’s monthly disability benefits of \$3115 results in the**
12 **Presumption of Abuse Arising with \$2,193 in Monthly Disposable Income.**

13 Section 707(b)(1) provides that the court may dismiss a case filed by an individual whose debts
14 are primarily consumer debts if it finds that granting relief would be an abuse of the provisions of
15 chapter 7. 11 U.S.C. § 707(b)(1). In determining whether granting relief would constitute “abuse”
16 under Section 707(b)(1), courts shall presume that abuse exists if:

17 ... the debtor’s current monthly income reduced by [the deductions specified in
18 subsections (ii), (iii), and (iv),] multiplied by 60 is not less than the lesser of -

19 (I) 25 percent of the debtor’s nonpriority unsecured claims in
the case, or \$6,575, whichever is greater; or

20 (II) \$10,950.

21 11 U.S.C. § 707(b)(2)(A)(I).

22 Mrs. Accornero’s disability retirements benefits should be included in the calculation of “current
23 monthly income.” In Blausey v. U.S. Trustee, 552 F.3d 1124 (9th Cir. 2009), the Ninth Circuit held that
24 private disability insurance benefits did not fall within exceptions to “current monthly income” as
25 defined by 11 U.S.C. § 101(10A)(B). Id. at 1132 -1134. On Debtors’ Schedule I – Current Income of
26 Individual Debtors, the Debtors characterized the \$3115 as “CalPERS disability retirement.” The
27 Debtors have admitted in their testimony that the \$3115 is to be received by Mrs. Acconero for the rest

1 of life for her permanent disability as a former police officer. The U.S. Trustee contends that Mrs.
2 Accornero's benefits should receive the same treatment as the private disability benefits in Blausey case,
3 that is the benefits should be counted in "current monthly income."

4 Including the \$3115 in the Debtors' income results in the presumption of abuse.

5 **B. No Known "Special Circumstances" Rebut The Presumption.**

6 In a Section 707(b)(2) proceeding, the presumption of abuse may only be rebutted by evidence of
7 "special circumstances, such as a serious medical condition or a call to active duty in the Armed Forces,
8 to the extent such special circumstances that justify additional expenses or adjustments of current
9 monthly income for which there is no reasonable alternative." 11 U.S.C. § 707(b)(2)(B)(I). The Debtors
10 have offered no evidence of special circumstances that could justify any additional expenses or
11 adjustments to income.

12 **C. The Totality of the Circumstances of Debtor's Financial Condition Demonstrates an**
13 **Abuse of Chapter 7 Because They Have the Ability to Pay Creditors By Making**
14 **Minor Adjustments to Their Budget.**

15 Independent of the determination of whether the presumption of abuse arises under Section
16 707(b)(2), a case may also be dismissed under Section 707(b)(3)(B) where the totality of the
17 circumstances of the debtor's financial situation demonstrates an abuse of chapter 7. 11 U.S.C. §
18 707(b)(3)(B). See also In re Pak, 343 B.R. 239, 241 (Bankr. N.D. Cal. 2006) (chapter 7 case can be
19 dismissed for "abuse" under § 707(b)(3) even if abuse is not presumed as a result of the Means Test); see
20 also In re Paret, 347 B.R. 12, 15 (Bankr. D. Del. 2006) (the "shall" directive in § 707(b)(3) "explicitly
21 mandates" consideration of the totality of the circumstances to determine whether abuse exists if the §
22 707(b)(2) presumption does not arise or is rebutted).

23 The standard by which abuse is measured under Section 707(b)(3)(B) is the totality of the
24 circumstances of a debtor's financial condition. The inquiry into the circumstances of a debtor's
25 financial condition is a factual one that requires the court to consider the totality of a debtor's financial
26 condition. In re Lamug, 403 B.R. 47 (Bankr. N.D. Cal. 2009); In re Baeza, 398 B.R. 692 (Bankr. E.D.
27 Cal. 2008). Prior to the enactment of BAPCPA, the ability to pay was measured by a debtor's ability to

1 pay his or her creditors under a hypothetical chapter 13 plan. See In re Kelly, 841 F.2d 908 (9th Cir.
2 1988) and In re Price, 353 F.3d 1135 (9th Cir. 2004). However, there is no textual support for reading
3 section 707(b)(3)(B) as hinging a finding of abuse on whether the debtor can fund a chapter 13 plan. In
4 re Baeza, 398 B.R. 692 (Bankr. E.D. Cal. 2008). To the contrary, the default remedy for abuse under
5 section 707(b)(3)(B) is dismissal, not conversion. See 11 U.S.C. § 707(b)(1).

6 In Lamug, Judge Efremsky dismissed a chapter 7 case where the debtors had the ability to pay
7 their creditors under the totality of the circumstances holding that the phrase “totality of the
8 circumstances” continued to have the same meaning post-BAPCPA and that “the ability to pay, standing
9 by itself, remains a sufficient ground to support a finding of abuse under post-BAPCPA § 707(b)(3)(B).”
10 In re Lamug, 403 B.R. at 55. The courts in Lamug and Baeza both considered the pre-BAPCPA factors
11 set forth in In re Price, 353 F.3d. 1135 (9th Cir. 2004), which require a case-by-case analysis of the
12 debtor’s actual financial situation or condition. In re Lamug, 403 B.R. at 54-55; In re Baeza, 398 B.R. at
13 696 and 697-8.

14 Calculation of Excess Funds. Debtors have the ability to pay creditors. With very minor
15 adjustments to the Debtors’ budget, as reflected in Schedules I and J, the U.S. Trustee calculates, at a
16 minimum, that the Debtors have at least \$1,083 per month in excess of necessities.

17 Some minor adjustments would include the following¹:

- 18 (1) Toys. Debtors have indicated an intent to keep paying monthly secured debt on several
19 recreational vehicles: 2005 Eclipse Attitude Travel Trailer (\$215); 2008 Kawasaki 4
20 wheel (\$132); 2007 Yamaha dirt bike (\$198), a total monthly amount of \$545.
21 (2) Recreation. Debtors’ budget includes expenses which, when added together, appear to
22 include substantial discretionary cushion. For example, Debtors listed under “Other
23 Expenditures” miscellaneous expenses in a monthly total amount of \$508, in addition to
24

25 ¹The U.S. Trustee reserves the right to conduct more formal discovery. The Debtors have
26 provided some documentation of some expenses, but the U.S. Trustee did not conduct full blown formal
27 discovery in reliance upon statements by counsel that the Debtors would be converting this case to a case
28 under chapter 13.

recreation claimed (Schedule J, Line 9) in the amount of \$195. The amounts in this category total \$703. Cutting this expense in half would not appear to seriously impair the Debtors' needs, especially given the excess in other categories of expenses.

(C) Telephone/Internet. In addition to claiming \$95 for telephone, the Debtors also claim an additional \$180 per month for "internet/TV/house phone." The monthly amount of \$275 appears high for this category of expense. While the calculation below did not deduct this expense from the household budget, this expense illustrates the cushion which appears to be built into the Debtors' budget.

(D) Deductions from income - Voluntary 457 plan - \$108. The U.S. Trustee contends that the Debtors could cease voluntary contributions for five years without hardship.

By adding the voluntary contribution amount of \$108 to \$10,776 (Line 16 of Schedule I), the U.S. Trustee has adjusted Debtors' monthly income to \$10,884. By eliminating luxury items on Schedule J (\$545 + ½ of the total recreational amount – \$350), the U.S. Trustee has reduced monthly expenses by \$895, resulting in total monthly expenses of \$9801.

While the U.S. Trustee contends that there is room for further reductions and reserves the right to conduct further discovery, it is apparent that the Debtors have excess funds available to pay creditors. The minor adjustments result in available funds as follows:

Adjusted income:	\$10,884
Adjusted expenses:	<u>9,801</u>
Adjusted available funds:	<u>\$ 1,083</u>

In a sixty month plan, \$1,083 per month would result in total dividends of \$64,980, a 63% distribution to creditors based upon total unsecured debt of \$102,331.

Excess Spending. A review of Debtors' expenses in the months preceding their bankruptcy filing also shows that the Debtors were accustomed to spending a considerable amount of their budget on recreational items, with no apparent hardship on other expenses since the Debtors intend to keep their home and all of their recreational vehicles.

A review of Debtors' credit card statements shows that in the six months before the filing,

Debtors took a number of vacations or trips to Las Vegas, campgrounds, and generally expended significant sums on recreational expenses, an amount inconsistent with individuals who were experiencing financial hardship. The following are examples of the type of expenses and the recurring nature of recreational expenses observed by reviewing just one of Debtors' credit card statements:

<u>Date</u>	<u>Expense</u>	<u>Amount</u>
9/4/10	Willits KOA	\$ 139
9/27/10	Wine club	100
8/7/10	Maylons Brewing	145
7/24/10	Trinity KOA	202
7/31/10	New York New York Las Vegas	77
8/14/10	Clos Du Bois Winery	170
8/17/10	Comcast	337
4/22/10	Quality Inn - Mountainview	519
5/9/10	Wynn Las Vegas	540
3/20/10	Lions Gate	425
4/15/10	Quality Inn	519
3/21/10	New York New York Las Vegas	<u>351</u>
	Total	\$3,524

While the identified excessive expenses may explain Debtors' financial difficulties, the U.S. Trustee intends to conduct further discovery to ascertain the extent of spending as it may suggest actual ability to repay creditors, or other abuse, including bad faith.

III. CONCLUSION

This case is presumed abusive and the Debtors have offered no evidence of special circumstances. Dismissal is also appropriate under the totality of the circumstances of the Debtors' financial situation because they have the apparent ability to pay creditors with ease, have stable income and employment. Thus, this case is an abuse of the provisions of chapter 7 and should be dismissed.

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2 WHEREFORE, the U.S. Trustee requests the Court enter an order dismissing this case.
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4 Dated: December 8, 2010

Respectfully submitted,

5 AUGUST B. LANDIS
6 Acting United States Trustee
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8 By: /s/ Donna S. Tamanaha
9 Donna S. Tamanaha
Assistant U.S. Trustee
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